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1993

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## Recommended Citation

Andrzej Balaban, *Developing a New Constitution for Poland*, 41 Clev. St. L. Rev. 503 (1993)  
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol41/iss3/4>

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# DEVELOPING A NEW CONSTITUTION FOR POLAND

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Without examining the long, complicated, and even distinguished constitutional history of Poland, it is impossible to understand the challenge facing that country as endeavors to establish a new Polish constitution are underway. History and tradition have long been the inspirational force and strength behind Poland's continual resistance to aggressors and occupiers, including the communist authorities. Ultimately, the constitutional history of Poland proved to be a dominating factor in the defeat of communism and the development of an independent Polish state, changes which lead to similar events throughout the countries of Central and Eastern Europe. This examination of the constitutional history of Poland and the repeated efforts to establish a constitutional state will provide a backdrop to the current debate on constitutional change in Poland.

External forces, notably the unfortunate tendency of Poland's neighbors to occupy it, have precluded a smooth and consistent constitutional history in Poland. Rather, Poland has experienced several periods of constitutionalism interrupted by autocratic control. The Polish people have, however, over the centuries repeatedly returned to the development of a constitution, as they are again doing now.

In the middle ages a peculiar political system, known as the "Noble Democracy," was developed in Poland. It was a unique system which guaranteed a significant part of the nation participation in the government of Poland and which led to the limitation on the powers of the monarchy.<sup>2</sup> These democratic reforms of the monarchy were ultimately reflected in the Polish constitution of May 3, 1791. This was the first constitution in Europe that reflected the progressive ideas of the United States Constitution and of the French Constitution enacted a short time later on September 3, 1791.<sup>3</sup> In spite of this attempt at reform, the Polish state disintegrated and was divided among Russia, Prussia and Austria in 1793 and 1795.<sup>4</sup> However, the struggle for independence continued with success following World War I in 1918.<sup>5</sup>

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<sup>2</sup>Rett R. Ludwikowski, *Two First: A Comparative Study of the American and the Polish Constitutions*, 8 MICH. Y.B. INT'L LEGAL STUD. 117, 120-30 (1987).

<sup>3</sup>Mark F. Brzezinski, *Constitutional Heritage and Renewal: The Case of Poland*, 77 VA. L. REV. 49, 49, 63 (1991).

<sup>4</sup>RAY TARAS, POLAND: SOCIALIST STATE, REBELLIOUS NATION 22 (1986).

<sup>5</sup>Bronislaw Helczynski, *The Law in the Reborn State*, in POLISH LAW THROUGHOUT THE AGES 139 (Wencelas J. Wagner ed., 1970).

The next Polish constitution was passed in 1921, and was based on traditional ideas and values of democracy.<sup>6</sup> Difficulties in adjusting to the new constitution, combined with extraordinary economic difficulties, brought significant changes to the constitution in 1935.<sup>7</sup> These changes essentially made Poland a more autocratic state, with the authority of other institutions subordinated to the power of the President.<sup>8</sup> Following the German invasion of 1939, the Polish government was exiled to Britain where it continued to respect the 1935 constitution because of pressure from the allies, even though it was not fundamentally democratic.<sup>9</sup>

After six years of German occupation, "freedom" brought the army of the Soviet Union to Poland, and with it, the virtual dictation of a post-World War II communist regime.<sup>10</sup> Initially, the reconstruction of property relations and the political, economic, and legal systems were to take place under the 1921 constitution; however, a new constitution was developed by the communists in 1952.<sup>11</sup> This constitution had little influence because of the lack of respect given to it.<sup>12</sup> Many of its provisions were not observed or implemented. For example, parliamentary terms established in the constitution were arbitrarily lengthened or shortened. More importantly, a state of war (emergency) was proclaimed in 1981, although the constitution provided that such a declaration could be proclaimed only in the case of *external aggression*.<sup>13</sup>

In addition to outright disregard for the constitution, three other important developments raised questions about its legitimacy: the first in 1976, the second in the early 1980s and the third in 1989. The constitutional revision of 1976 was a strictly political amendment that referred to the communist ideology, established the dominant position of the communist party and strengthened the ties between Poland and the Soviet Union.<sup>14</sup>

The second important development was popular reform movements which began in the 1980s after the state of emergency had been proclaimed by the Polish government. The two most notable changes were the institution of the

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<sup>6</sup>Ludwik Kos-Rabcewicz-Zubkowski, *Polish Constitutional Law*, in *POLISH LAW THROUGHOUT THE AGES* 215, 255 (Wenceslas J. Wagner ed., 1970). See also Leszek Garlicki, *Constitutional Developments in Poland*, 32 ST. LOUIS U. L.J. 713 (1988).

<sup>7</sup>Brzezinski, *supra* note 3, at 79.

<sup>8</sup>Kos-Rabcewicz-Zubkowski, *supra* note 6, at 260.

<sup>9</sup>*Id.* at 287.

<sup>10</sup>TARAS, *supra* note 4, at 46-47.

<sup>11</sup>NORMAN DAVIES, *GOD'S PLAYGROUND: A HISTORY OF POLAND* 580 (1982).

<sup>12</sup>Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 U. CHI. L. REV. 595, 597 (1991).

<sup>13</sup>See Maurice D. Simon, *Martial Law and Beyond: Jaruzelski's Poland in the Post-December 1981 Period*, in *POLISH POLITICS: EDGE OF THE ABYSS* 345, 345 (Jack Bielasiak & Maurice Simon eds., 1984).

<sup>14</sup>DAVIES, *supra* note 11, at 609.

Constitutional Tribunal and the development of the Ombudsman. The Constitutional Tribunal held responsibility for interpreting the Polish constitution and determining the legality of many of the acts and orders issued by the central government.<sup>15</sup> The Ombudsman, established in 1987, was a spokesperson for human rights.<sup>16</sup> These reforms of the political systems, however, did not involve a change in the substantive law and did not satisfy the growing dissatisfaction with the existing political system and the communist regime. As dissatisfaction with the autocratic central government increased, "Solidarity," a movement that combined the forces of workers and intellectuals, played a major role in forcing substantive political and eventual constitutional change.<sup>17</sup>

Solidarity had been suppressed for some time under the declaration of a state of emergency. By the end of the 1980s, however, it had forced the Communist Party and the government to negotiate and to permit some democratic participation.<sup>18</sup> In June 1989, Solidarity won the parliamentary elections which were now partly free in the main chamber (Sejm) and fully free in the Senate, a new chamber established as a result of the "round table" negotiations.<sup>19</sup> The election of 1989, as well as the local elections held in the Spring of 1990, involved nothing less than the replacement of a political establishment.<sup>20</sup> The subsequent presidential election won by Lech Walesa was also an important demonstration of the return to democratic government.

From a constitutional perspective, the third development, the revisions of the constitution made on December 28, 1989, were very significant. It was a complete rejection of the political system imposed on Poland following World War II, and provided a platform from which to write an entirely new constitution—a process currently underway.<sup>21</sup> The new constitution will undoubtedly reflect four particularly important areas of the December 28, 1989, revisions.

First, Poland was proclaimed a democratic state, dedicated to the principles of social justice. This was in mark contrast to the former provisions that proclaimed Poland to be a socialistic country, treating the communist ideology as a state ideology.<sup>22</sup> In the old constitution the purpose of the state was to

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<sup>15</sup>Brzezinski, *supra* note 3, at 98.

<sup>16</sup>Ewa Letowska, *The Polish Ombudsman (The Commissioner for the Protection of Civil Rights)*, 39 INT'L & COMP. L.Q. 206 (1990).

<sup>17</sup>TARAS, *supra* note 4, at 63-64.

<sup>18</sup>Brzezinski, *supra* note 3, at 105.

<sup>19</sup>Kazimerz Kloc, *Poland's Political System: Change and Future Scenarios*, in *POLAND INTO THE 1990'S: ECONOMY AND SOCIETY IN TRANSITION* 11, 15 (George Blazysca & Ryszard Rapacki eds., 1991).

<sup>20</sup>Brzezinski, *supra* note 3, at 103.

<sup>21</sup>Rapaczynski, *supra* note 12, at 601.

<sup>22</sup>Brzezinski, *supra* note 3, at 108.

promote the communist ideology, and the Communist Party supervised the state and its agencies. The new formulation of the Polish government was somewhat ambiguous and open to interpretation. This ambiguity is illustrated by a dispute questioning whether the principles of a lawful state inherently require the separation of powers among the branches of government. The principle of parliamentary supremacy that has traditionally been part of the Polish system and the political systems of many other European countries<sup>23</sup> leads many to conclude that the separation of powers, particularly as defined by Americans, is not essential.

The second fundamental change in the December 28, 1989, constitutional revision is the declaration (in article 4) of the freedom of political parties. Politicians are allowed to be registered and are free to engage in political activity if they do not break the law or violate the constitution.<sup>24</sup> Prior to the revisions of 1989, the Communist Party and its two satellite parties were the only legal political parties in Poland.<sup>25</sup> Only a few years after this changed, more than 150 new legal parties had been formed, although many of them inevitably represent similar positions. This dramatic growth of political parties has created new problems in the election laws.<sup>26</sup> There is on one hand the need to recognize all political parties; on the other hand, there is the political reality that while the influence of a small party may be slight, the large number of small parties can disrupt the process of forming majority governments. The upcoming parliament elections may reflect many of these political disturbances as parties gain popularity through appeals to the people's dissatisfaction with the lower standard of living, unemployment, and general economic troubles under the leadership of Solidarity and the Catholic Church. However, it is likely that the established support for the Catholic Church and Solidarity will dominate the election results.

The third great change resulting from the December 28, 1989, revisions attempts to provide for democratic control of local governments, which operated under the former constitution through "national councils," and in fact were representatives of the central government.<sup>27</sup> The 1989 revisions have decreased the call for the national government to address local needs, but they are only the first step toward building true local democracy. The local self-governing under these revisions has taken place only in the smallest

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<sup>23</sup>Rapaczynski, *supra* note 12, at 624.

<sup>24</sup>See POLISH CONST. art 84 (English translation of Gisbert H. Flanz, *Poland, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (Albert P. Blaustein & Gisbert H. Flanz eds., 1991)). [hereinafter POLISH CONST.]

<sup>25</sup>Brzezinski, *supra* note 3, at 101.

<sup>26</sup>See Rapaczynski, *supra* note 12, at 620.

<sup>27</sup>JACEK JEDRUCH, CONSTITUTIONS, ELECTIONS, & LEGISLATURES OF POLAND, 1493-1977 A GUIDE TO THEIR HISTORY 432 (1982).

territorial units and lacks adequate financing and qualified staff.<sup>28</sup> There is popular support for continued development of local self-government and, undoubtedly, it will be expanded throughout the entire country.

The fourth change rising from the 1989 revision is the most important. The sixth and seventh articles transform the economic system of Poland. The dominant system of state property and its special legal protections under communism were abolished.<sup>29</sup> The new provisions guarantee free economic enterprise and the protection of property. In short, it means a return to the free market where success is determined by ability and economic factors, not direct state intervention. The process of transferring state property and business into private hands is proceeding. Employees of state-run enterprises and the former owners of property long confiscated by the government will again own the property and means of production in Poland. Along with these changes, capital and securities markets are being formed, and anti-trust legislation to regulate such markets has been adopted in initial forms.<sup>30</sup>

In addition to the changes described above, there were a variety of other modifications in the December 1989 constitutional revisions. Chapters of the earlier constitution entitled "The Political System" and "The Social and Economic System" were essentially eliminated.<sup>31</sup> These sections were full of platitudes for which it was impossible to provide useful legal interpretation. Principles referring to the "uniform system of state power" and abolition of social classes were also eliminated as uninterpretable. Unfortunately, some potentially important provisions were lost in the 1989 revisions. Notably, articles 12 and 15 involving environmental protection and the preservation of cultivatable land were omitted.<sup>32</sup> These revisions were made possible because of the "round table" negotiations between the communist government and the opposition which took place earlier in 1989. Directly from the "round table" negotiations came the establishment of a new presidency and the creation of the senate as a second chamber of the legislature.<sup>33</sup> In addition, reform of the judiciary and the public prosecutor's office has been successfully undertaken since 1989.

Following 1989, Poland faced a need to establish a completely new constitution. The revisions of 1989 created some of the framework and principles, but it left many constitutional questions unanswered. Furthermore, sections of it were not well coordinated into a coherent whole.

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<sup>28</sup> See Brzezinski, *supra* note 3 at 106-07, 107 n.400.

<sup>29</sup> See POLISH CONST. ch. 2.

<sup>30</sup> Brzezinski, *supra* note 3, at 108. See also Wojciech Sokolewicz, *The Polish Constitution in Poland*, 13 L. & POL'Y 125 (1991).

<sup>31</sup> See POLISH CONST. ch. 2.

<sup>32</sup> *Id.*

<sup>33</sup> KLOC, *supra* note 19. See also, Frances Millard, *The Context of Polish Constitutional Reform*, 20 INT'L SOC. L. 17 (1992).

To address these problems, the constitutional committee of the Sejm has undertaken work on a new constitution.<sup>34</sup> The committee consists of 53 members and must make recommendations about many fundamental constitutional issues. The level of specificity desirable in a constitution is an important question that the committee is facing. It is necessary to establish a constitution which allows the evolution of the social and economic systems during the coming years without the need for continual amending or revising. In Poland this means that the committee must decide whether to describe the social and economic system relating to the free market economy in the constitution, or to omit the specific references with the understanding that the practical realities of the future will require a variety of legal regulations which may interfere with a "pure" free market system.<sup>35</sup> It would be nearly impossible to specify the proper balance between free market and the need for regulation in a constitutional document that is intended to last many years.

There is considerable satisfaction with many of the current structural arrangements that came from the 1989 revisions. It is, for example, well settled that Poland will have a president and a legislature that will include a second house, the senate. The appropriate function for the senate is not at all settled, however. Several other critical issues must be addressed, including the proper balance between the president and the parliament.<sup>36</sup> The extraordinary power of the president to control the government in a state of emergency or in defense of the country are matters of concern because of the potential for abuse. Furthermore, maintaining the link between the offices of the minister of justice and the general public prosecutor is fraught with undesirable conflicts of interest. Additional issues related to the power of the local governments must also be considered.

It is clear that the new constitution will seek to protect human rights and civil liberties. The development of international law and the European Economic Community's human rights principles will be of great significance as the civil liberties sections of the constitution are developed. The problem will be matching popular expectations regarding individual rights with the economic resources available. The communist system announced many social rights, and the people expect a new democratic government to succeed in implementing and developing these rights.<sup>37</sup> Among them were, the right to free health care, the right to free education, the right to leisure and rest, and the right to work. The new constitution must deal with the inconsistencies among these expectations and current liberal policy and economic forces. If the constitution guarantees these social rights, it will create a significant problem for future government; if it does not announce these rights, many citizens of

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<sup>34</sup>Rapaczynski, *supra* note 12, at 601.

<sup>35</sup>*Id.* at 612.

<sup>36</sup>*Id.* at 623-26.

<sup>37</sup>*Id.* at 612.

the country will be disappointed and reluctant to fully recognize the validity of the constitution.<sup>38</sup>

The Constitutional Committee faced with these challenges is not an open body, and its consultation with lawyers and others is secret. This is not consistent with the public opinion in Poland, although it may perhaps be excused because of the need to finish the constitution as quickly as possible. It was hoped that the new constitution could be adopted on May 3, 1991, the 200th anniversary of Poland's first constitution. For a variety of reasons, however, completion of the constitution has been delayed. First, there was the hope that the elections would place the entire problem on a more democratic basis with more complete public support. Furthermore, the Constitutional Committee would like to make a survey of public opinion regarding critical issues. At the time of this writing it is not possible to anticipate the precise procedure that will be used in adopting the constitution, nor is it possible to predict with any accuracy the exact date that it will be adopted.

In addition to the work of the Constitutional Committee, a number of other proposals are coming from a variety of sources including political parties and individuals. One of them has been prepared in the Senate, although this chamber is not authorized to resolve constitutional questions. All of these suggestions contribute to the discussion of the new constitution and to its public discussion and its understanding of the issues. Undoubtedly the most appropriate way to finally adopt the constitution would be through a referendum because if the constitution which guarantees democratic reform is adopted democratically, the constitution will evince its efficacy and validity. Thus, the constitutional ideal that was so important for us in the years of struggle of independence, 1795-1918, and more recently 1944-1989, may become a reality.

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<sup>38</sup>*Id.*



